CASE NO. 16-1276

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MINTEQ INTERNATIONAL, INC., AND SPECIALTY MINERALS, INC., WHOLLY OWNED SUBSIDIARIES OF MINERALS TECHNOLOGIES, INC.

Petitioner/Cross-Respondent,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent/Cross-Petitioner.

ON PETITION FOR REVIEW FROM ORDER OF THE NATIONAL LABOR RELATIONS BOARD

PETITION FOR REHEARING *EN BANC*

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CORPORATE DISCLOSURE STATEMENT PURSUANT TO CIRCUIT RULE 26.1

Pursuant to the Federal Rules of Appellate Procedure 26.1 and Circuit Rule 26.1, the undersigned counsel for Petitioner states that Minteq International, Inc. and Specialty Minerals, Inc. are wholly owned subsidiaries of Mineral Technologies, Inc. Mineral Technologies Inc. is a publicly held non-governmental corporate party, and does not have any parent corporation and no publicly held corporation owns 10% or more of its stock.

CERTIFICATE OF PARTIES, RULINGS AND RELATED CASES

A. Parties and *Amici*

1. Minteq International, Inc. ("Minteq") and Specialty Minerals, Inc. ("SMI"), wholly owned subsidiaries of Minerals Technologies, Inc. ("MTI"), together are the Petitioner.

2. The National Labor Relations Board ("Board" or "NLRB") is the Respondent.

3. The International Union of Operating Engineers, Local 150, AFL-CIO ("Union") is the Intervenor and was the charging party before Region 13 of the Board.

4. There were no *amici* in the proceedings before the Court.

B. Ruling Under Review

Petitioner seeks rehearing *en banc* of the Decision and Judgment dated April 28, 2017, captioned as *Minteq International, Inc., and Specialty Minerals, Inc., Wholly Owned Subsidiaries of Mineral Technologies, Inc. and International Union of Operating Engineers, Local 150, AFL-CIO*, No. 16-1276, (D.C. Cir. April 28, 2017).

C. Related Cases

The instant case has not previously been before this Court or any other court involving the same parties.

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I. INTRODUCTION AND RULE 35 STATEMENT

Pursuant to Rule 35 of the Federal Rules of Appellate Procedure and this Court's rules, Minteq respectfully requests a rehearing *en banc* of a panel opinion issued by Chief Judge Garland and Judges Griffith and Sentelle on April 28, 2017.

In 2012, Minteq implemented a requirement that new hires for SMS Gunner positions sign a Non-compete and Confidentiality Agreement ("NCCA"). SMS Gunners have access to and are trained to apply a "proprietary refractory material" Minteq uses to line the furnaces of its steel mill customers. The NCCA prohibits SMS Gunners from disclosing or using Minteq's confidential information and trade secrets, working for a competitor during and for a period of 18 months after their employment, and using inventions developed during their working time or with the use of Minteq's equipment, supplies, facilities or trade secret information. The panel held Minteq violated Section 8(a)(5) of the National Labor Relations Act ("NLRA") because the subject of the NCCA was not "covered by" its collective bargaining agreement ("CBA") with the Union and was a mandatory subject of bargaining.

An employer has no duty to bargain if a subject is "covered by" rights set forth in its CBA with a union. *NLRB v. United States Postal Service*, 8 F.3d 832, 836 (D.C. Cir. 1993). In determining whether a subject is "covered by" a CBA, full effect is given to plain language, including a broad reservation of general

rights. *Local Union No. 47, Int'l Bhd. of Electrical Workers v. NLRB*, 927 F.2d 635, 640 (D.C. Cir. 1991). It is not necessary for a CBA to specifically mention, refer to, or address the subject at issue. *Enloe Medical Center v. NLRB*, 433 F.3d 834, 839 (D.C. Cir. 2005). As long as the subject is "within the compass" of the parties' CBA, no duty to bargain can be found. *Postal Service*, 8 F.3d at 838.

This Court has jealously guarded the above principles for over twenty years. A rehearing *en banc* is necessary because the panel not only departed from these principles; it collapsed this Court's "contract coverage" doctrine and the "clear and unmistakable waiver" doctrine this Court has consistently and vigorously rejected. *Wilkes-Barre Hospital Company, LLC, v. NLRB*, 2017 U.S. App. LEXIS 8791, at *24 (D.C. Cir., 2017)("We begin by noting that the Board improperly collapsed the contract coverage and waiver questions").

The panel justified it holding that the NCCA was a mandatory subject of bargaining based on a stunningly overbroad modification of dictum in *Allied Chemical & Alkali Workers, Local Union No. 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 180 (1971). The panel held that any "provisions affecting the future economic situation 'of active workers are part and parcel of their overall compensation and hence a well-established statutory subject of bargaining.'" *Minteq* at 7.

A *rehearing en banc* is necessary because *Pittsburgh Plate Glass* does not bear the weight of the *per se* rule established by the panel's decision. To the contrary. The panel's decision conflicts with the Supreme Court's decisions in *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203 (1964) and *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981). These cases hold that a balancing test should be applied to determine whether decisions which impact the economic situation of employees but have as their central focus the profitability of a business are subject to bargaining. *First National Maintenance*, 452 U.S. at 677. The panel's limitless expansion of *Pittsburgh Plate Glass* swallows these cases whole and does so on an issue of exceptional importance; namely, whether an employer's decision to use restrictive covenants to protect the lifeblood of its business (e.g., intellectual property, confidential business information, and investment in human capital) against unfair competition constitutes a mandatory subject of bargaining. For these reasons, Minteq respectfully requests that its Petition be granted.

II. ARGUMENT IN SUPPORT OF REHEARING *EN BANC*

A. Rehearing *En Banc* Is Necessary to Maintain Uniformity of the Court's "Contract Coverage" Decisions.

The NLRB applies a "clear and unmistakable waiver" doctrine to determine whether a union has contractually relinquished its right to bargain over changes in terms and conditions of employment. *Oak Harbor Freight Lines, Inc. v. NLRB*,

855 F.3d. 436 (D.C. Cir. 2017). This Court has rejected the NLRB's approach and the heavy burden it imposes, choosing instead to follow the "contract coverage" doctrine. *Heartland Plymouth Court MI, LLC v. NLRB*, 838 F.3d 16 (D.C. Cir. 2016)(Board's longstanding nonacquienscence towards applying contract coverage test followed by D.C. Circuit "takes obduracy to a new level").

In determining whether a subject is "covered by" a CBA, this Court applies ordinary principles of contract interpretation. "[T]he courts are bound to enforce lawful labor agreements as written." *Postal Service*, 8 F.3d at 836. When the parties have negotiated provisions reserving to an employer the right to make various decisions, this Court "will give full effect to the plain meaning of such provision(s)." *Local Union No. 47*, 927 F.2d at 640. For this reason, this Court has consistently rejected the NLRB's attempt to require that a CBA "specifically mention," *Enloe Med. Center v. NLRB*, 433 F.3d 834, 839 (D.C. Cir. 2005) or "specifically refer," *Postal Service*, 8 F.3d at 838, to the decision at issue. A decision is deemed "covered by" a CBA and not subject to further bargaining as long as it is "within the compass" of any provision of the CBA. *Postal Service*, 8 F.3d at 838. See also, *Conoco Inc. v. NLRB*, 91 F.3d 1523, 1527 (D.C. Cir. 1996). None of these principles were discussed let alone followed by the panel.

Starting with the plain language of the CBA, Minteq has the right to "regulate the use of machinery facilities, equipment, ***and other property of the***

Company" (emphasis not in the original). *Minteq* at 3. By definition, post-employment restrictions on the use of Minteq's intellectual property and confidential business information is a regulation of "other property of the Company" and, therefore, "within the compass" of the CBA under this Court's precedent. The panel did not address this language or argument in its decision.

Minteq has the right to "issue, amend, and revise ***work rules.***" (emphasis not in the original). *Minteq* at 3. The Complaint in this case alleged and the NLRB held that the NCCA constituted "work rules." Once the panel accepted the NLRB's argument that the NCCA constitutes "work rules", the only way it could be true to this Court's "contract coverage" precedent was to find the NCCA was "within the compass" of the language expressly reserving to Minteq the right to "issue . . . work rules."

Finally, Minteq has a catch-all right to "take whatever action is either necessary or advisable to manage and fulfill the mission of the Company." *Minteq* at 3. Central to mission of any company is the protection of its confidential business information, intellectual property, and human capital. The NCCA protects Minteq and all of its employees from the harm that would occur if SMS Gunners are allowed to disclose or use confidential information, steal inventions conceived or developed during their employment, or use their special skill and knowledge to compete with Minteq. *See e.g., United Auto Workers v. NLRB*, 765

F.2d 175 (1985)(general right to "manage the plant and business and direct the working force" includes the right to relocate plant); *Postal Service*, 8 F.3d 832 (right to change work schedules "within the compass" of general right to "transfer and assign employees," "determine the method, means and personnel by which operations are to be conducted").

The panel's substantial break with this Court's precedent is evident in its holding that:

> These enumerated rights are limited to traditional managerial prerogatives to make basic business decisions and govern conduct in the workplace, such as hiring, assigning and directing work, setting productivity standards, and issuing Standards of Conduct. ***The clause provides nothing with respect to the heirs and assignees of employees or to their further capacities after the end of employment***.

Minteq at 8 (emphasis not in original). The panel's requirement that the clause specifically provide something "with respect to the heirs and assignees of employees or to their further capacities after the end of employment" is at odds with this Court's decisions in *Wilkes-Barre Hospital*, 2017 US. App. Lexis at 8791, 20, *Enloe*, 433 F.3d at 839, *and Postal Service*, 8 F.3d at 838, and collapses the "contract coverage" and "clear and unmistakable waiver" doctrines. All that is required under the "covered by" doctrine is that a subject be "within the compass" of the CBA; a bedrock principal of this Court's decisions never once mentioned by the panel.

Further evidence the panel collapsed these doctrines is found in its holding that:

> While the list of rights concludes with a general provision granting the Company the right to "take whatever action is either necessary or advisable to manage and fulfill the mission of the Company and to direct the Company's employees," J.A. 502, we do not read this phrase to "include conduct wholly unlike that specified in the immediately preceding list," *Mohave Elec. Coop., Inc. v. NLRB*, 206 F.3d 1183, 1191-92 (D.C. Cir. 2000).

Minteq at 8. In *Mohave*, this Court used a "wholly unlike" analysis to determine whether a no-strike clause was a "clear and unmistakable waiver" of the statutory right employees otherwise had to file an injunction against a coworker who was being physically harassing.

The CBA makes clear in the opening line of the management rights clause that "statutory and inherent managerial rights, prerogatives, and functions" are reserved to Minteq and that any limits on them must be expressed in "a specific provision of this Agreement." It is hard to imagine a business decision more basic than the decision to use a NCCA to protect an employer's intellectual property, confidential business information, and investment in human capital. Neither the NLRB nor the panel was ever able to identify a specific provision of the CBA limiting Minteq's right to a NCCA to protect the business.

Moreover, the CBA plainly does not limit Minteq's right to simply making "basic business decisions" and governing "conduct in the workplace" as the panel

found. The non-exhaustive list of rights reserved to Minteq (never cited or discussed in the panel's decision) also includes the right "to introduce new or improved research, production, service, distribution, and maintenance methods, materials, machinery, and equipment." This right has no particular value unless it includes the corresponding right to protect the investments made in developing "new or improved research, production, service, distribution, and maintenance methods, materials, machinery, and equipment."

The parties in this case were intentionally broad in their drafting of the management rights clause. Indeed, Judge Sentelle stated that Minteq's management rights clause was the "broadest he had seen in 30 years of following labor law." Given the breadth and clarity of all the language discussed above, this Court's prior decisions compelled a finding that the post-employment restrictions at issue fell "within the compass" of the CBA. For all of these reasons, the panel failed to follow precedent and a rehearing en banc is necessary to maintain uniformity with the other panel decisions on the contract coverage issue.

B. A Rehearing *En Banc* Is Necessary Because the Panel's Decision Conflicts With the Supreme Court's Decision In *First National Maintenance*.

In *Pittsburgh Plate Glass,* the Supreme Court held that an employer was not required to bargain over changes in the benefits of current retirees because such matters do not vitally effect bargaining unit employees. 404 U.S. at 179. In

dictum, the Supreme Court stated, "to be sure, the future retirement benefits of active workers are part and parcel of their overall compensation and hence a well-established statutory subject of bargaining" *Id.* at 180.

The courts are free to rely on such dictum in cases involving changes to the future retirement benefits of current employees. *S. Nuclear Operating Co. v. NLRB*, 524 F.3d 1350, 1356 (D.C. Cir. 2008). However, courts are "duty-bound to decide issues . . . in accordance with the law as laid down" by Supreme Court of the United States and not "misinterpret what the Supreme Court has said in order to achieve a desired result in a particular case." *Block v. Pitney Bowes, Inc.*, 952 F.2d 1450, 1456 (D.C. Cir. 1992). A rehearing *en banc* is necessary because the panel did not fulfill its obligations in this regard.

First, the panel expanded the *Pittsburgh Plate Glass* dictum quoted above to cover a factually inapposite subject that has nothing to do with a "core component" of employee compensation. It is true that the NCCA regulates the ability of current employees to disclose or use Minteq's confidential information and trade secrets, work for a competitor, or use inventions developed during their working time or with the use of Minteq's equipment, supplies, facilities or trade secret information. However, any compensation that Minteq employees might receive from third parties for engaging in these anti-competitive activities is speculative at best and cannot reasonably be classified as "part and parcel" of the compensation they

receive for performing their jobs for Minteq or be considered to something as basic to employee compensation as retirement benefits. The attenuated impact of a decision on the benefits of current employees is the very reason the Supreme Court in *Pittsburgh Plate Glass* found that benefits for current retirees are not a mandatory subject of bargaining.

Second, the panel literally replaced the Supreme Court's narrow phrase "provisions affecting future retirement benefits of active workers . . ." with the phrase "provisions affecting the future economic situation of active workers . . . ." The panel's re-write of *Pittsburgh Plate Glass* to hold that any "provisions affecting the future economic situation of active workers are part and parcel of their overall compensation" and, therefore, a mandatory subject of bargaining is in direct conflict with and completely swallows the Supreme Court's decisions in *Fibreboard* and *First National Maintenance*.

In *Fibreboard,* the Supreme Court held that decisions at the "core of entrepreneurial control" such as decisions involving the basic scope of the enterprise or to invest capital are not mandatory subjects of bargaining even though they directly impact terms of conditions of employment. 379 U.S. at 223. In *First National Maintenance*, the Supreme Court further defined the duty to bargain by grouping management decisions into three categories. Category 1 decisions are those that have "only an indirect and attenuated impact on the employment

relationship" such as "choice of advertising and promotion, product type and design, and financing arrangements." *Id.* at 676-677 citing to *Fibreboard*, 379 U.S. at 223 (Stewart, J., concurring). These decisions are not mandatory subjects of bargaining. Category 2 decisions, which are presumptively mandatory subjects, are those that "are almost exclusively 'an aspect of the relationship' between employer and employee" such as the "order of succession of layoffs and recalls, production quotas, and work rules." *Id.* at 677 quoting *Pittsburgh Plate Glass*, 404 U.S. at 178. Category 3 decisions are those that have "a direct impact on employment . . . but [have] as [their] focus only the economic profitability of" the business. *First National Maintenance*, 452 U.S. at 677. Category 3 decisions are not subject to bargaining unless "the benefit, for labor-management relations and the collective-bargaining process, outweighs the burden placed on the conduct of the business." *Id.*

This Court, prior to the panel's decision, followed the three-category framework set forth in *First National Maintenance* in determining whether a management decision is subject to bargaining. *See e.g., Arc Bridges, Inc. v. NLRB*, 662 F.3d 1235, 1238 (D.C. Cir., 2011)(employer's budget is a managerial function not subject to decision bargaining); *Regal Cinemas, Inc. v. NLRB*, 317 F.3d 300, 309 (D.C. Cir. 2003)(decision to transfer work to non-unit employees was a mandatory subject of bargaining). The panel's decision collapses this framework

into a single inquiry – i.e., does the management decision at issue "affect the future economic situation" of active workers? If so, the decision is *per se* subject to bargaining. There is no analysis of whether the decision has "only an indirect and attenuated impact" on the employment relationship, is "almost exclusively" an aspect of that relationship, or, while having a "direct impact" on employment relationship, lies at the core of entrepreneurial control and has as its focus the economic profitability of the business. *En banc* review is necessary because the Supreme Court in *Pittsburgh Plate Glass*, *Fibreboard*, and *First National Maintenance* never dreamed of let alone articulated the sweeping standard adopted by the panel.

Justice Stewart stated in his concurrence in *Fibreboard* that "the purpose of § 8(d) is to describe a limited area subject to the duty of collective bargaining, those management decisions which are fundamental to the basic direction of a corporate enterprise or which impinge only indirectly upon employment security should be excluded from that area." 379 U.S. at 223. Whether or what type of restrictive covenants an employer needs or desires to protect its intellectual property, confidential business information, and investment in human capital against unfair competition involves such decisions and whether those decisions are amenable to collective bargaining (and the associated threat of delay, strikes, and lockouts) under Category Three of *First National Maintenance* is an issue of

exceptional importance.

III. CONCLUSION

For the reasons stated above, the Petition should be granted.

Respectfully submitted:

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CERTIFICATE OF COMPLIANCE

1. This petition complies with the type-volume limitation of FED. R. APP. P. 32(a)(7)(B) because:

■ This petition contains 2,870 words, excluding the parts of the brief exempted by FED. R. APP. P. 32(a)(7)(B)(i).

2. This petition complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and the type style requirements of FED. R. APP. P. 32(a)(6) because:

■ This petition has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14 point Times New Roman font.

/s/ Jonathan O. Levine
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CERTIFICATE OF SERVICE

The undersigned certifies that today, June 12, 2017, a copy of the attached *Petition for Rehearing En Banc of Petitioner/Cross-Respondent* was electronically transmitted to the United States Court of Appeals for the District of Columbia Circuit using the Court's ECF filing system, and was served on all counsel via electronic notice pursuant to the Court's ECF filing system.

/s/ Jonathan O. Levine
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